United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1874

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Bp/s

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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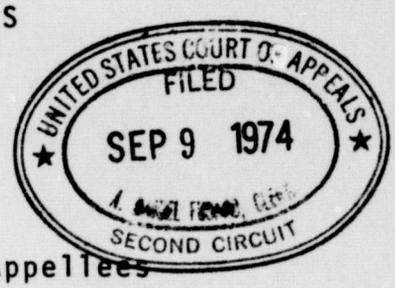

SUSAN ROE, et al
Plaintiffs, Appellees

v.

NICHOLAS NORTON, et al
Defendants, Appellants

BRIEF OF APPELLANT

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ISSUE

Is The Connecticut Requirement That An Abortion Be Certified As "Medically Necessary" In Conflict With The Provisions Of Title 42 U.S.C. Section 1396 *et seq.*?

STATEMENT OF THE CASE

This is an appeal by the defendant-Commissioner of Welfare of the State of Connecticut from a judgment entered by the district court on the plaintiffs' motion for summary judgment. The plaintiffs in this action were two women who were eligible for "Title XIX" medical benefits under 42 U.S.C. Section 1396 et seq. and the State of Connecticut's Medical Assistance Program. Both were recipients of Aid to Families With Dependent Children. Plaintiff Poe had an abortion in September, 1973. The Connecticut welfare department refused to pay for the cost of that abortion under its "Medicaid" Medical Assistance Program. Plaintiff Roe, who was pregnant at the time this suit was instituted, obtained a temporary restraining order, by consent of the parties, which prevented the welfare department from refusing to pay for the costs of that abortion under the Title XIX Medicaid Program. Neither of the plaintiffs had submitted to the welfare department, as required by Section 275 of its manual, a statement, signed by the patient's attending physician and the chief of the obstetrics and gynecology unit of an accredited hospital, certifying that the abortion was medically necessary.

The district court entered judgment declaring that Section 275 of Vol. 3, of the Connecticut Welfare Department, Public Assistance Program Manual, is invalid as contrary to the Medicaid

provisions of the Social Security Act (42 U.S.C. Section 1396 et seq.), and enjoining defendants from enforcing it. [R 22 ,p.8]

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE

The plaintiffs, in their brief and in oral argument [Tr.p 9,10], claimed that the welfare department's policy of requiring a written certification, from the plaintiff's attending physician and the chief of obstetrics/gynecology of the hospital where the abortion was to be performed, certifying that the contemplated abortion was "medically necessary', before payment could be authorized under the Medicaid Program, constituted and interference by defendants with plaintiffs' constitutional rights and was in violation of the decisions of the Supreme Court in Roe v. Wade, 410 U.S. 113, (1973); and Doe v. Bolton, 410 U.S. 179, (1973).

The defendants denied that there was any violation of the decisions in Roe v. Wade, supra, and Doe v. Bolton, supra, involved in these procedures. The defendants had conceded [Tr. p. 22,23[that a woman in the State of Connecticut at the present time is free to have an abortion without State interference of any kind, at least during the first trimester of her pregnancy.

The problem which is presented by this case is not a problem resulting from State interference with a woman's right to obtain an abortion. The problem is that the plaintiffs in this action are indigent and without funds to pay for an abortion. It is, therefore, not a problem of obtaining an abortion per se. The plaintiffs seem to be saying that Roe v. Wade and Doe

v. Bolton, supra, require the State to pay for plaintiffs' abortions. Defendants believe there is no valid basis at all for this contention.

The defendants' view the problem presented in this action as simply a determination as to whether or not an abortion that is not certified as "medically necessary" by the patient's own attending physician is a medical service eligible for payment under the State's "Medicaid" program. They believe it is not, and they believe further that the requirement that an abortion be certified as "medically necessary" is essentially the same requirement contained in 42 U.S.C. Section 1396, that in order for any medical service to be eligible for payment under the Act it must be a "...necessary medical service."[1]

The plaintiffs had also claimed that they are entitled to

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[1] Sec. 1396. Appropriations. For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

payment under Medicaid for an abortion without a certification of medical necessity, as a family planning service under Title IV-A of the Social Security Act, 42 U.S.C. Sec. 602(a)(15), and 42 U.S.C. Sec. 1396d(a)(1)(C), and 42 U.S.C. Sec. 300a(6). The defendants believe their is no validity to this claim. This point was briefed by the parties and argued orally before the district court. No mention of entitlement to an abortion as a family planning service is contained in the district court's memorandum of decision or judgment, and, presumably, the court found no merit in this contention.

The question of whether or not the federal statute (42 U.S.C. Sec. 1396) and, consequently, the State policy (Manual, Sec. 275) would result in an denial of equal protection if interpreted so as to provide coverage only for "medically necessary" abortions, was not considered by the district court. Such a determination would require the convening of a three-judge court under 28 U.S.C. Sec. 2281-2284.

ARGUMENT

Is The Connecticut Requirement That An Abortion Be Certified As "Medically Necessary" In Conflict With The Federal Statute?

Although, as indicated previously, the plaintiffs in this action have alleged constitutional violations of their rights by defendants, the motion for summary judgment by the single-judge district court ruled only that the defendants' policy manual, Section 275, was in conflict with the federal statute (42 U.S.C. Sec. 1396 et seq.). Thus, the district court's memorandum of decision, [R 22,p.3] reads, in pertinent part, as follows:

> "...[T]he constitutional claim is plainly substantial enough to invoke the jurisdiction of this Court and to justify consideration of the pendent statutory claim, see Hagans v. Lavine, ___U.S.___ (Mar.25,1974), without convening a three-judge court, 28 U.S.C. Sec.2281, or considering whether decisions of the Supreme Court in Roe v. Wade, supra, and Doe v. Bolton, 410 U.S.179 (1973), have obviated the need for a three-judge court to rule on the constitutional claim. Cf. Bailey v. Patterson, 369 U.S. 31 (1962)."

Therefore, the decision of the district court on the plaintiffs' motion for summary judgment does not purport to be anything other than a decision which holds that the Connecticut welfare policy manual requirement that an abortion be certified as "medically necessary" before payment can be made therefor

under Title XIX, "...is invalid as contrary to the Medicaid provisions of the Social Security Act..." [R.22,p. 8].

There is, nevertheless, some language in the court's memorandum of decision referring to the constitutionality of Title XIX, and "...the exercise of constitutionally protected rights..." [Id, pp.8,9]. But this language, defendants believe, must be regarded as dicta since the single-judge district court was prohibited from deciding the constitutional issues by 28 U.S.C. Section 2281.

A. What Was The Intent Of Congress As Expressed In 42 U.S.C. Section 1396 et seq.?

Both "Medicare", Title XVIII, a program of health insurance for the aged, (42 U.S.C. Section 1395 et seq.), and "Medicaid", Title XIX, a medical assistance program for the needy and medically needy, (42 U.S.C. Section 1396 et seq.) were enacted by Congress in 1965, at the same time and as parts of the same bill, viz. Public Law 89-97, entitled "Social Security Amendments of 1965."

In addition to the provision in 42 U.S.C. Section 1396, supra, that, under Title XIX, medical assistance is to be furnished on behalf of families "...whose income and resources are insufficient to meet the costs of necessary medical services..." [emphasis added], there is other language in the Act which corroborates the view that Congress intended that the scope of the Act be limited to necessary medical services, and not to all medical services.

Thus, Section 1396a(a)(10)(C)(i) reads, in part, as follows:

"(a)A State plan for medical assistance must - provide

(10) ***

(C) ***

(i) for making medical assistance available to all individuals who would...be eligible for assistance under any such State plan...and who have insufficient...income and resources to meet the costs

of necessary medical and remedial care and services..." [emphasis added]

And Section 1396a(a)(30) reads that a state plan for medical assistance must

> "(30) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan...as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments ...are not in excess of reasonable charges consistent with efficiency, economy, and quality of care;" [emphasis added].

The legislative history of the bill is contained in 1965 U.S. Code Congressional and Administrative News, p. 1943 et seq. Senate Report 404, sets forth, initially, a brief summary of the overall purpose of H.R. 6675 as follows:

> "First, to provide a coordinated approach for health insurance and medical care for the aged under the Social Security Act by establishing three new health care programs: (1) a compulsory hospital-based program for the aged; (2) a voluntary supplementary plan to provide physicians' and other supplementary health services for the aged; and (3) an expanded medical assistance program for the needy and medically needy, aged, blind, disabled, and families with dependent children."

(1) and (2) above are Part A and Part B, respectively, of

Title XVIII; (3) is Title XIX. Thus, Congress has enacted both titles as part of the same bill, and states that one of its purposes in enacting both titles is "to provide a coordinated approach for health insurance and medical care for the aged [and needy]."

At page 1944, Id. the three health care programs are again listed together under the heading: "Health insurance and medical care for the needy" in estimating the number of individuals to be covered by the programs. It is submitted that this is a strong indication of the intent of Congress that both the scope and limitations of coverage of both Titles are to be roughly equal.

The legislative history of the bill, supra, provides, at page 1986, under the heading "General Provisions Relating To The Basic and Voluntary Supplementary Plans [referring to Title XVIII not Title XIX] (a) Conditions and limitations on payment for services (1) Physicians' role --[that]

The committee's bill [emphasis added] provides that the physician is to be the key figure in determining utilization of health services -- and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments, and determine the length of stay. For this reason the bill [once again emphasis added] would require that payment could be made only if a physician certifies to the medical necessity of the services furnished..."

"In the case of in-patient hospital services for which

payment would be made, the bill [emphasis added] would require that a physician certify that the services were required for an individual's medical treatment, or that in-patient diagnostic study was medically required and that the services were necessary for such purpose...In the case of out-patient hospital diagnostic services, a physician would have to certify that the services were required for diagnostic study."

At page 1989, Id. the legislative history reads [still under the Title XVIII heading] under the heading: "(b) Exclusion from coverage -- The committee's bill [once again emphasis added] would exclude certain health items and services from coverage under both the hospital and the voluntary supplementary medical insurance programs in addition to any excluded through the operation of other provisions of the bill. For example, the bill [emphasis added] would bar payments for health items or services that are not reasonable and necessary for the treatment of illness or injury or to improve the functioning of a malformed body member. Thus, payment could be made for the rental of a special hospital bed to be used by the patient in his home only if it was a reasonable and necessary part of a sick person's treatment. Similarly, such potential personal comfort items and services as massages and heat lamp treatments would only be covered where they contribute meaningfully to the treatment of an illness or injury or the functioning of a malformed body member. Expenses for custodial care would be excluded."

Of course, it is not suggested that all the provisions

contained in the legislative history which appear in the section under Title XVIII are to be applied literally to Title XIX. But it is to be noted that in referring to the exclusions from coverage, and to the provision "that the physician is to be the key figure in determining utilization of health services," the reference is repeatedly made in the history, not alone to Title XVIII, but to "the committee's bill"as was repeatedly emphasized in the quotations, supra. It is submitted, however, that in attempting to determine the meaning of the words "necessary medical services" contained in Section 1396, supra, the foregoing language is highly significant and of great probative value.

It is scarcely conceivable, for example, that Congress did not intend that under Title XIX, as well as under Title XVIII, that "the physician is to be the key figure in determining utilization of health services" under "the Committee's bill."

The district court stated in its opinion [R.22,p.5] that:

> "[e]ven if it is assumed arguendo that Medicaid payments are limited to necessary medical services, the question remains whether an elective abortion, not performed to avoid any physical or psychiatric impairment, is 'necessary' within the meaning of what at most would be an implied limitation of Title XIX. Contrary to defendants' argument, the fact that the doctors of these plaintiffs have not certified their abortions as necessary does not mean that their abortions were not within

a proper construction of the Medicaid statute. The doctors were acting well within their field of expertise in concluding that in neither case did the plaintiff's physical or psychiatric health require an abortion as an alternative to childbirth. But whether that circumstance excludes these abortions from the coverage of a federal statute is a question of law, not of medicine."

It is, of course, true that the interpretation of a statute is a question of law to be decided by the courts. But it is also true that Congress provided, in enacting this legislation, that "the physician is to be the key figure in determining utilization of health services" as indicated supra. The question of whether or not an abortion is medically necessary is a question which Congress intended to leave to the patient's attending physician, not to the State and not to the Court. Ultimately, therefore, the question of whether or not an abortion is medically necessary is a question of medicine, not a question of law.

It is not a question of whether the abortion is "necessary", but a question of whether it is "medically necessary". Food and clothing are "necessary" to the plaintiffs in this action as, indeed, they are to everyone. But Title XIX was not enacted by Congress to provide food and clothing for indigent persons. It was and is limited to providing medically necessary care only.

How then can it be contended that Title XIX coverage extends to an abortion in a case in which the patient's own attending physician will not certify that the abortion is a necessary medical service?[2]

From some of the questions asked in plaintiffs' interrogatories, there may be lingering suspicion that the Connecticut requirement, under Title XIX, that an abortion be "medically necessary" is a means of continuing, in the case of indigents, the old Connecticut anti-abortion policy which was struck down in Abele v. Markle 342 F. Supp. 800 (1972) as a result of the decision in Roe v. Wade, supra.[3] But the answer to Question #16 of the interrogatories, [R.1 ,p.11] should quickly dispel such a notion. That answer indicates that some 964 abortions were performed and paid for under the Connecticut's Title XIX program from July 1, 1973 through February 28, 1974.

It is, of course, a fundamental rule of statutory construction that, in the interpretation of statutes, the legislative

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2 The State has no "veto" power over the attending physician. His certificate of medical necessity is accepted at face value.

3 Of course, in Rosado v. Wyman, 397 U.S. 397 , 90 S.Ct.1207 25 L.Ed 2d 442 (1970), the late Justice Harlan warned that political speculation is to be shunned by the Court.

will is the all-important or controlling factor. United States v. N. E. Rosenblum Truck Lines, Inc.,315 U.S. 50, 62 S.Ct. 445, 86 L.Ed 671, and that the primary rule of construction of statutes is to ascertain the intention of the legislature. United States v. Cooper Corporation, 312 U.S.600, 61 S.Ct. 742, 85 L.Ed 1071.

It is respectfully submitted, that in its determination of the question of whether or not the State policy requirement of "medical necessity" was in conflict with the federal statute, the district court did not approach the question primarily from the standpoint of determining what was the intent of Congress as expressed in the federal statute, Title 42 U.S.C. Section 1396 et seq.

The district court's decision [R.22,p.8] which provides that "...Title XIX must be construed to permit payment for elective abortions..." and again [R.22,pp.7,8]: "...[G]overnment is not required by the Constitution to pay for medical service, but once it decides to provide payments, it must not unduly disadvantage those who exercise a constitutional right ..." ignores the word "necessary" in Section 1396 and indeed the more precise language contained in the legislative history, supra.

The district court has in effect interpreted Section 1396 as though Congress had omitted the word "necessary" in "neces-

sary medical services". By so doing, the court's ruling would vastly expand the limited medical coverage which Congress clearly intended that the Title XIX Program should have, and which the State of Connecticut believed it was required to provide, and has transformed it into a comprehensive medical program without apparent limitation.[4]

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4 In its memorandum of decision, the district court stated, [R.22,p.6]: "...[I]t may well be that where a condition does not require any medical attention whatever, such as a disfiguring scar, cosmetic surgery at the patient's request is not covered by the statute. However, when a patient's condition does require some medical attention, the choice of service to be rendered should normally be a matter between doctor and patient, and the service they select is eligible for payment, so long as it is an accepted medical procedure, and does not involve costs that are excessive compared to adequate alternatives." The district court did not cite any authority for this assertion.

B. HEW's Position On Payment For Abortion Under Medicaid.

In its memorandum of decision [R.22,p. 7], the district court stated that:

> "The views of the agency administering the statute have weight in determining its proper construction, Lewis v. Martin, 397 U.S. 552, 559 (1970); see Zemel v. Rusk, 381 U.S. 1, 11-12 (1965), and the United States Department of Health, Education and Welfare has expressed its views in this litigation that the Medicaid provisions do not exclude any abortions. In a letter to plaintiffs' counsel [the associate commissioner of the HEW's Social and Rehabilitation Service stated that 'under Title XIX, federal financial participation is available for any abortions for which the state welfare agency provides payment.'"

The district court apparently believed that the letter from HEW, referred to above, was tantamount to an endorsement of the plaintiffs' claim that Title XIX provides payment for an abortion without regard to whether or not it is medically necessary. The defendants believe that any such inference drawn from the HEW letter is unfounded. The HEW letter merely states that under Title XIX federal financial participation is available for any abortions for which the state welfare agency provides payment. This is not an assertion by HEW that an abortion which is not found, by the patient's attending physician, to be medically

necessary, should be included for coverage under Title XIX. It is , at most, a statement by HEW that, if the State pays for a non-medically necessary abortion, HEW will not challenge that action or deny federal reimbursement for it. In effect, HEW is saying that when it comes to payment for non-medically necessary abortions, it will defer completely to the State's decision on this question.[5] Whether or not HEW has, in this instance, failed to exercise the responsibility delegated to it by Congress, to implement and administer the Title XIX program, quaere. Abortion is, of course, one of the most politically controversial issues in the nation today.

At any rate, the defendants submit that the administrative agency's position on the issue presented by this case is equivocal if not evasive. The district court therefore was not justified in citing the HEW letter in support of the proposition that HEW interpreted the Act as authorizing payment for an abortion not found to be medically necessary by the patient's own physician. Therefore, the principle that "the views of the agency

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5 In Doe v. Wohlgemuth, 376 F.2d 173, (1974), (discussed infra), the three-judge court made a determined effort to obtain an unequivocal statement of HEW's position on this question but its efforts in this regard were unsuccessful. Id, at p. 178.

administering the statute have weight in determining its proper construction," is largely meaningless in this instance, since HEW appears to have done its best not to take a stand on either side of this question.

C. The Constitutional Issues Involved

As indicated previously, the questions of whether or not the provision of 42 U.S.C. Section 1396 that medical assistance be furnished to meet the costs of necessary medical services, and the requirement of the Connecticut welfare policy manual that coverage under Title XIX is provided when the abortion is medically necessary, are in violation of the plaintiffs' constitutional rights are questions whose determination must be left to a three-judge court under 28 U.S.C. Sections 2281-2284. However, the district court stated in its opinion [R 22 ,p.7] that:

> "...Any construction of Title XIX that would prohibit payment for elective abortions or permit state regulations that burden a woman's election to have an abortion, at least during the first two trimesters of pregnancy, would raise substantial constitutional questions in light of the Supreme Court's decisions in Roe v. Wade, supra, and Doe v. Bolton, supra ..."

Although the single-judge district court cannot (and did not purport to) decide the constitutional questions, nevertheless, the district court can properly consider the constitutional issues insofar as they have a bearing on the construction to be placed on the federal statute if that statute appears to be ambiguous in its lanquage.[6] There is, of course, a rule of statutory construction

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[6] The defendants' position is that 42 U.S.C. 1396 et seq. is not ambiguous. But if it is, any such ambiguity is resolved by referring to the legislative history of the Act, as indicated supra.

which favors the interpretation of an ambiguous statute in such a manner, if the circumstances allow, so as not to render the statute unconstitutional. This appears to be the meaning of the district court's reference cited above. But is such a conclusion a valid one in this case? Does the interpretation of 42 U.S.C. Section 1396 et seq. in such a manner as to exclude from coverage elective abortions, which are not certified as medically necessary, "raise substantial constitutional questions in light of the Supreme Court's decisions in Roe v. Wade ...and Doe v. Bolton ..."? The defendants submit that it does not.

In enacting what is now Medicar (Title XVIII) and Medicaid (Title XIX), Congress indicated that it was its purpose[7] "... to provide a coordinated approach for health insurance and medical care for the aged [and needy] by establishing three new health care programs: (1) a compulsory hospital-based program for the aged; (2) a voluntary supplementary plan to provide physicians' and other supplementary health services for the aged; and (3) an expanded medical assistance program for the needy and medically needy aged, blind, disabled, and families with dependent children."

It is clear therefore that the intent of Congress in enacting this legislation was to provide medical care to the needy and medically needy. But it limited the medical care thus provided to

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[7] U. S. Congresssional and Administrative News (1965), p. 1943

necessary medical care.[8] Abortion is covered under Title XIX whenever it is a necessary medical service. The limitations thus placed by Congress upon the coverage of the Act do not raise "substantial constitutional questions in light of the Supreme Court's decisions in Roe v. Wade...and Doe v. Bolton..." since there is involved no interference whatever by the State with a woman's right to obtain an abortion. The question here is only whether an indigent woman who desires an abortion can qualify for eligibility for payment for such an abortion under Title XIX.

Nor is there presented under this interpretation of the Act a constitutional question of a denial of equal protection to the plaintiffs. Congress, in enacting Title XIX, did not purport to deal with all the problems presented by indigency but only with the medical problems presented by indigency. And it prescribed the conditions under which it would provide medical care to the indigent under the Act, and it limited that care to necessary medical services. To hold that a denial of equal protection will arise if Congress attempts to deal with one facet of the problems caused by indigency without dealing with all the problems caused by indigency is not a tenable position. Certainly an indigent

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[8] Even this statement is not entirely accurate. There are many instances in which Congress has curtailed or even excluded the provision of necessary medical services under the act, presumably because of the prohibitive costs involved.

woman who desires an abortion and cannot find a doctor who considers such an abortion to be medically necessary has a very serious problem. But that problem was not intended by Congress to be dealt with under Title XIX. The district court cannot create an ambiguity in the statute where none in fact existed, and thereupon interpret the statute to include a provision which Congress did not intend.

Mr. Justice Cardozo commented on this point in 1937 when he stated:

> "Congress may spend money in aid of the 'general welfare'...yet difficulties are left when the power is conceded. The line must be drawn between one welfare and another. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the Courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law." Helvering v. Davis, 301 U.S. 619, 640, 57 S.Ct. 904, 81 L.Ed. 1307 (1937).

Where Congress has acted in matters dealing with expenditure of federal funds to promote general welfare, it is the will of Congress, and not that of the courts or states, that guides resolution of the controversy. Bryant v. Carleson, (C.A. Calif. 1971) 444 F.2d 353, 359, cert. den. 92 S.Ct. 344, 404 U.S. 967, 30 L.Ed. 2d 287.

The cases cited in the district court's opinion do not support the court's contention unless it is assumed a priori that Title XIX does authorize payment for elective, non-medically necessary abortions. But this approach merely begs the question which the district court was called upon to decide in the first instance.

It is submitted that the district court's premise that any construction of Title XIX which would prohibit payment for elective abortions would raise substantial constitutional questions has not been substantiated. Therefore, an interpretation of the statute based upon such a premise should not be permitted to stand.

CONCLUSION

The defendants have tried to show that the district court erred when it enjoined the defendant-Commissioner from enforcing the welfare policy manual provision which required the patient's attending physician to certify that an abortion was medically necessary before payment could be made therefor under Title XIX. The defendants maintain that that requirement was not contrary to the federal statute, 42 U.S.C. Section 1396 et seq. for the reasons stated aforesaid.

Prior to the district court's decision in this case, the Title XIX medical assistance program was more costly to the State of Connecticut than any other single welfare program, including AFDC, and the cost of the program has continued to increase rapidly each year. If the decision of the district court is allowed to stand, it may be interpreted as holding that Title XIX is a virtually unlimited medical program which pays for almost any medical service. The language of the court's opinion [R.22,p.6] which reads:

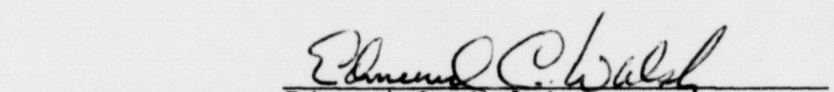
> "However, when a patient's condition does require some medical attention, the choice of service to be rendered should normally be a matter between doctor and patient, so long as it is an accepted medical procedure, and does not involve costs that are excessive compared to adequate alternatives."

is particularly alarming to the defendants in this action. If that is the standard to be applied to determining the scope of services included under the Title XIX program, the ensuing costs of the program are likely to be staggering. Such medical services as orthodontics, cosmetic surgery, and comprehensive dental care, to name but a few, which have heretofore been excluded from the program, may now be required to be provided. The costs could be enormous.

The defendant submits that if the physician of the individual patient's own choosing is unwilling to certify that a medical service, be it abortion or whatever, is not medically necessary, then it was not the intent of Congress, as expressed in the Act, that payment should be made therefor under Title XIX.

For the foregoing reasons, the decision of the district court should be set aside, and the case should be dismissed unless this Court believes that the constitutional issue of equal protection is not insubstantial. In that event, the case should be remanded for the convening of a three-judge court.

Respectfully submitted,



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